



September 2, 2009

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
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Re: *Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption, WC Docket No. 09-152*

Dear Ms. Dortch:

Great Lakes Communication Corp. and Superior Telephone Cooperative, Petitioners in the above-named docket, file this letter and attachment in response to the "Preliminary Statement for the Record of Qwest Communications Company, LLC" filed August 28, 2009 ("Statement").

Though Petitioners intend to respond to the Comments which are due in WC Docket No. 09-152 September 21, 2009, they feel compelled to respond now to the serious and unfounded allegations in the August 28, 2009 Qwest filing. Qwest alleges that Petitioners have created "misperceptions" as to the relief Qwest sought and won before the Iowa Utilities Board ("IUB") in its state complaint case. It has made similar accusations at the IUB. Qwest is incorrect.

Appended hereto is the Reply in Support of Motion for Stay of Proceedings that Petitioners filed in the IUB case on September 1, 2009. The Reply demonstrates that Petitioners have accurately related the claims, allegations, and request for relief which Qwest brought before the Board and which the Board granted in the decision meeting held on August 14, 2009. Petitioners will address Qwest's arguments and inaccurate representations more thoroughly in their Reply Comments, but, given the gravity of the allegations Qwest lodged in the Statement, felt a brief response was appropriate at this time.

Thank you for your consideration.

Arent Fox

Sincerely,

A handwritten signature in black ink, reading "Ross A. Buntrock". The signature is written in a cursive, flowing style with a large, prominent "R" and "B".

Ross A. Buntrock

Enclosure

ATTACHMENT

SEP - 1 2009

IOWA UTILITIES BOARD

TRANSMITTAL

DATE: September 1, 2009

CASE: Docket No. FCU-07-02, *IN RE: Qwest Communications Corporation vs. Superior Telephone Cooperative et al.*

SUBJECT MATTER: **GREAT LAKES COMMUNICATION CORPORATION AND SUPERIOR TELEPHONE COOPERATIVE REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

COMPANY NAME: Superior Telephone and Great Lakes

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INITIAL FILING: No

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

In re:

Qwest Communications Corp.,

Complainant,

v.

Superior Telephone Cooperative, *et al.*,

Movants.

Docket No. FCU-07-2

**GREAT LAKES COMMUNICATION CORP.
AND SUPERIOR TELEPHONE COOPERATIVE
REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS**

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September 1, 2009

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*Counsel for Great Lakes Communication
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Great Lakes Communication Corp. and Superior Telephone Cooperative, collectively the "Movants," hereby reply to the three pleadings filed August 28, 2009, in resistance¹ to the Motion to Stay Proceedings filed August 17, 2009 ("Motion"). Movants have sought leave to file this reply principally in order to address allegations that they have deliberately misled the Iowa Utilities Board (the "Board") in seeking a stay of proceedings until the Federal Communications Commission ("FCC") resolves the Petition for Declaratory Ruling and Contingent Preemption ("FCC Petition"). These allegations cannot stand and Movants should be permitted to disprove them.

DISCUSSION

I. MOVANTS HAVE COMPLIED WITH ALL DISCOVERY, TESTIMONY, AND BRIEFING OBLIGATIONS IN THIS CASE

Qwest suggests that the Motion is simply another "antic" to "delay" the resolution of this case, and that "Respondents have done everything in their power from acquiring the evidence, and to prevent the Board from evaluating the evidence and issuing a decision." Qwest Response at 1, 5. Qwest does not define "Respondents," and Movants sincerely hope that Qwest is not referring to their conduct in this case, for as to Great Lakes and Superior no accusation of stonewalling would be proper.

Great Lakes and Superior responded timely responded to five rounds of discovery from Qwest, including permitting Qwest access to their respective central offices for an inspection that, as Qwest's own evidentiary presentation and briefs show, proved worthless. The continuance of the hearing in this case was never requested by either Movant, and Movants have

¹ Qwest's Response to Great Lakes and Superior Telephone's Motion to Stay Proceedings, Supplemental Motion, and Adventure Joinder (Aug. 29, 2009) ("Qwest Response"); AT&T's Opposition to Motion to Stay Proceedings (Aug. 28, 2009) ("AT&T Opposition"); Sprint's Resistance to Great Lakes' Motion to Stay (Aug. 28, 2009) ("Sprint Resistance").

never asked this Board for an extension of time to comply with the post-hearing schedule.

Qwest's broadbrush characterization of "Respondents," if it intends to include Great Lakes and Superior, is baseless.

Moreover, it is Qwest who sought to impede discovery by Movants in this case. After Qwest had inspected each of their central offices, Movants timely filed Notices of Deposition for the two Qwest personnel who performed the inspections. These persons plainly acquired knowledge about Movants that Qwest intended to use in its case in chief. As such, Movants were entitled to depose these persons.

Qwest moved to quash Movants' deposition notices, lodging objections of relevance and privilege. Qwest Motion for Protective Order Against Depositions of Randy Struthers and Betty Lee (Oct. 27, 2009). The Board denied Qwest's motion on November 24, 2009, finding that "the Respondents ... are entitled to access to these witnesses, whose impressions have been relied upon by QCC in its rebuttal testimony[.]" Order Denying Motion for Protective Order at 3-4 (Nov. 24, 2008). Qwest's attempt to keep Movants from deposing persons whose factual knowledge was relevant to this case was thus deemed baseless by the Board. Therefore, as between Qwest and Movants, plainly it is Qwest that is the party who sought to block attempts to conduct proper discovery. Qwest's *ad hominem* attack on "Respondents" is thus misplaced and inappropriate.

II. MOVANTS HAVE SATISFIED ALL FOUR PRONGS OF IOWA CODE § 17A.19(5)(c)

Movants amply demonstrated, in accordance with Iowa Code 17A.19(5)(c), that they (1) are likely to prevail on the merits of the FCC Petition, (2) will suffer irreparable harm absent a stay, (3) the IXCs will suffer no harm upon entry of a stay, and (4) the public interest strongly favors a stay. Motion at 3-5. The IXCs' responses quite miss the mark on each prong,

and instead resort to accusations of “misrepresentations” or to reliance on a finding of “illegality” that only underscores why a stay is warranted.

A. Qwest’s Own Requests for Relief, and the Board’s Grant of Much of That Relief, Include Matters of Interstate Telecommunications and Thus Movants Are Likely to Succeed on the Merits of Their FCC Petition

Movants have demonstrated that they are likely to prevail on their FCC Petition on the basis of Qwest’s own requests for relief and the Board’s public statements on August 14, 2009. Motion at 4-7 (citing, *inter alia*, *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm’n*, 394 F.3d 568 (8th Cir. 2004)). Qwest accuses Movants of making deliberate misrepresentations of these items, and thus Movants must respond by providing, again, the exact language of Qwest and the Board that incited the FCC Petition in the first instance. Far from merely “affecting” interstate communications, as AT&T concedes (AT&T Opposition at 2), the Board’s vote on August 14, 2009, shows that the decision in this case directly affects interstate access tariffs, terms, conditions, and revenue.

As an initial matter, Movants have not argued to the FCC that the Board “is without jurisdiction to decide the issues in this case.” Qwest Response at 1. Even a cursory reading of the FCC Petition refutes that allegation. Movants have explained to the FCC that Qwest’s claims in this case include matters of **interstate** telecommunications and thus exceed the Board’s jurisdiction. For example, Qwest has requested findings that:

- “[T]he LECs are not entitled to any compensation for the calls delivered to numbers associated with FCSCs because that calling is outside of the switched access tariffs.” Qwest Proposed Finding of Facts and Conclusion of Law No. 20 (“Qwest FFCL”).

- “[T]he arrangements between the LEC Respondents and the FCSCs to obtain and share revenues from long distance carriers through the offering of free calling services constitute unjust and unreasonable practices and constitute violations of the public interest and the LEC Respondents’ certifications.” Qwest FFCL No. 23.
- “Great Lakes and Aventure failed to satisfy the rural exemption and the facts that took them outside of the exemption were well known to them.” Qwest FFCL No. 24.
- “The Board orders the LECs to immediately cease and desist sharing of access revenues with FCSCs and to immediately disconnect the telephone numbers associated with such services.” Qwest FFCL No. 31.

The plain language of these items includes no differentiation between intrastate access and interstate access. By any reasonable reading of Qwest’s papers, Qwest is seeking relief for interstate calling traffic. Movants thus have misrepresented nothing to the Board or to the FCC.

Movants never told the FCC that *all* of Qwest’s claims affect interstate communications. *See* Qwest Response at 6 (listing Proposed Findings of Fact that Movants “fail[ed] to mention”). Had Movants believed otherwise, the FCC Petition would seek to enjoin the Board from issuing any ruling at all. Plainly the FCC Petition is more circumscribed than that, asking only for clarification from the FCC as to which matters the Board may rule on, and which not. Qwest’s unhelpful hyperbole is simply not the reality of this case or of Movants’ efforts at the FCC.

The rural exemption issue requires specific address. Here Qwest’s honest response shows the merits of Movants’ FCC Petition and its motion to the Board. It admits that

“Qwest firmly believes that the Board can make findings that show these LECs do not satisfy the rural exemption[.]” Qwest Response at 9.² This statement comports with the consistent testimony of Qwest’s witnesses who always have asserted that Great Lakes’ **interstate** termination rate, in its **interstate access tariff**, is too high. *E.g.*, FCU 07-2 Hearing Tr. at 1070:10-12 (Eckert). Qwest should not have brought this argument to the Board, and the Board should not rule on it. The Board’s willingness to hear it, however, evidences an intent to consider rural exemption eligibility — a matter solely within the FCC’s jurisdiction — in this case. This issue is one of many that undeniably has been made part of this case, and it is one that *Louisiana PSC* prohibits the Board from addressing.³ Qwest should have, but did not, raised this rural exemption matter at the FCC.

Sprint’s curious statement that *Louisiana PSC* favors the IXCs merits some address. Sprint Resistance at 3-4. Sprint feigns “surprise” that Great Lakes and Superior rely on this case. *See id.* at 4. Yet *Louisiana PSC* speaks directly to this proceeding, precisely because, as Sprint notes, it dealt with the state-federal dichotomy in telecommunications regulation. As such, the Supreme Court’s analysis is directly instructive to the Board: *Louisiana PSC* explains that there are limits to what State Commissions may do when regulating intrastate communications, in order not to impede on matters of exclusive FCC interstate jurisdiction. *See* FCC Petition at 21-26. That distinction is at time blurred in this case, but often completely ignored. Movants thus rely on *Louisiana PSC* precisely in order to ensure that the state-federal

² Movants are not sure which entities are included in the phrase “these LECs” which Qwest never defines. Superior is a rural ICO and its interstate terminating access has never veered from the NECA rate, and thus as to Superior the rural exemption is irrelevant.

³ *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (“Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, ... when there is outright or actual conflict between federal and state law, ... where compliance with both federal and state law is in effect physically impossible[.]”).

boundaries are respected and that the federal issues — including Qwest's calls for tampering with the LECs' interstate access revenue — are appropriately culled out.

The FCC Petition was a necessary filing. If anything, the Board should view the FCC Petition as a helpmeet that will give the Board further comfort that the relief Qwest has demanded should not have been granted here. Thus, when Qwest seeks a finding that "Great Lakes is not entitled to switched access for any of its calls," Qwest FFCL No. 18, the Board will have obtained the instruction from the FCC that the Board cannot grant that relief insofar as "*any* of its calls" includes interstate traffic. Unfortunately, however, the Board's statements during the public meeting held on August 14, 2009, indicate that it is granting much of that relief. Movants have thus sought the FCC's necessary input now, in order that the Board can correct such errors and possibly avoid appeal. With the Petition already having been put out for comment on an expedited schedule, Supplemental Motion Exh. A., the Board has nothing to lose by waiting for the FCC's decision.

B. The IXC Responses Themselves Demonstrate Movants' Irreparable Harm

Movants explained that they will suffer irreparable harm if the Board proceeds with its order that plainly will include matters of interstate jurisdiction. Motion at 7-8. Qwest's claim for relief includes a *nunc pro tunc* blessing on its failure to pay millions in lawfully accrued terminating access. The IXCs cannot refute that these monies represent a "significant revenue stream." AT&T Opposition at 3 (quoting Motion at 7). As such, the IXCs resort to the callous assertion that "the IXCs have for years withheld payment of access and the movants have continued to operate[.]" *Id.* at 13. The papers read as though the IXCs are disappointed by that fact.

Qwest's chief argument regarding the Movants' showing of harm is inapposite: "Great Lakes' business is based wholly on unlawful conduct." Qwest Response at 20. Sprint goes so far as to compare Great Lakes to a bank robber. Sprint Resistance at 6. Qwest and Sprint plainly have aimed to put Great Lakes out of existence. These arguments demonstrate that the IXCs' goal in this case is drive to drive LECs out of the market and, according to the Board's statements on August 14, it appears the IXCs are poised to succeed. The IXCs' responses thus demonstrate exactly why Movants satisfy the "irreparable harm" prong of Iowa Code § 17A.19(5)(c): the relief in the order may well destroy their businesses. The IXCs' own anticipation of this result forms exactly the situation for which stays are entered. Motion at 7 (citing, inter alia, *Ahmed v. U.S.*, 47 F. Supp. 2d 389, 400 (W.D.N.Y. 1999) (Store owner's averment that administrative sanctions would force him out of business was sufficient to establish irreparable harm); *American Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 123 (D.Conn. 1992)).

C. The IXCs Are Unable to Refute That They Will Not Be Harmed By a Stay, Having Already Withheld Terminating Access Payments from the LECs for Years

Movants demonstrated that the IXCs will not be harmed by a stay, because the IXCs already stopped paying terminating access almost three years ago. Motion at 8. Qwest, AT&T and Sprint have no answer to this argument. At most, they will endure a few months' wait to obtain, in final form, the ruling they seek — that their self-help refusal to pay, without the approval of any court or agency, was permissible. None of the IXCs can make any meaningful showing of harm; indeed, Qwest devotes only four sentences of its Response to this prong of Iowa Code § 17A.19(5)(c). Qwest Response at 20.

Further, Qwest's assertion that the FCC has "delayed" or "extended" the comment cycle on the FCC Petition is preposterous. Qwest Response at 21. No delay has occurred. The FCC released the Public Notice seeking comments only 6 calendar days after the FCC Petition was filed. Rarely, if ever, has the FCC put a Petition for Declaratory Ruling out for comment so quickly. Qwest's assertion that "under FCC rules" all responses to the Petition were due August 24 are false, and it is telling that Qwest provides no cite to these purported "FCC Rules." Qwest Response at 21. Qwest's counsel plainly does not understand FCC procedure. Petitions for Declaratory Ruling have no codified deadline for response; the FCC puts them out for comment under a schedule that is crafted for each Petition. Here, it took just 6 days for that action to happen.

The fact that the FCC allowed interested persons 30 days to file comments is more an indication of its acknowledgement of the upcoming federal holiday than anything else. Indeed, in related litigation Qwest's counsel has requested filing extensions for every item in the last six months, citing family vacations and other hardships. Qwest is incorrect in characterizing the FCC proceeding as "delayed" at all, and the Board should not accept that characterization in its consideration of the Motion to Stay. All indications are that the FCC will act swiftly. The IXCs' protestations that a stay would inflict harm therefore are unsupportable.

D. The Public Interest Favors a Stay Over the Needless Expenditure of Resources In Implementing an *Ultra Vires* State Commission Order

Movants have demonstrated that, as the FCC Media Bureau found in *Charter Communications*, the public interest weighs heavily in favor of delaying entry of a final order unless and until it is deemed not to infringe interstate communications. Motion at 8-9 (citing *Charter Communications Entertainment I, LLC*, 22 FCC Rcd. 13890 (2007)). The plainly interstate nature of the "relief" Qwest seeks, in its own words, in this case shows that the Board

is being urged to overstep its authority; the Board's announcement on August 14 that it grants the relief indicates that it already has decided to make that leap. As such, the order is unlawful.

Movants thus explained, in accordance with *Charter Communications*, that "[p]lainly the public would not be served by the Board's overseeing compliance with an *ultra vires* directive."

Motion at 8.

The IXC's are unable to explain why *Charter Communications* is not persuasive authority for the proposition that stays are appropriate to prevent the waste of resources which occurs when regulated entities are made to comply with *ultra vires* state orders. Qwest and AT&T do not even address *Charter*. See Qwest Response at 20-21; AT&T Opposition at 13-14. Sprint attempts to distinguish *Charter* on the ground that it regards cable service, not telephone service. Sprint Resistance at 2-3. Certainly Sprint's was not a serious argument. The IXC's thus have no answer to Movants' argument that the public interest will be best served by a stay of this case in order to ensure that whatever order issues will be of appropriate scope.

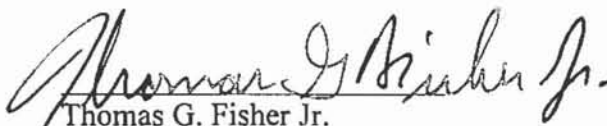
Finally, AT&T's and Sprint's argument that the phone calls — which are being placed by their own retail long distance customers — "clog up" the network is specious. First, the record demonstrates that many LECs have ceased relationships with conference call and chat line providers due to the burdens of this case and the fact that the IXC's ceased paying terminating access years ago. Secondly, it does not lie in Sprint's mouth to assert that increased call traffic has forced Sprint to augment its network, Sprint Resistance at 7, because Sprint routinely refused to do so. Indeed, the Board has found that Sprint actually blocked traffic to some LECs. Sprint's protestations of harm to the network are thus not credible.

CONCLUSION

For all these reasons, the Board should stay all further proceedings and abstain from issuing a final order pending the FCC's consideration of Movants' Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption.

September 1, 2009

Respectfully submitted,



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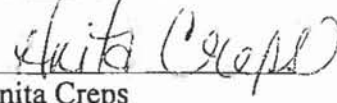
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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 2009, served the foregoing **GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE** **REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS** upon each of the following persons as required by the rules of the Iowa Utilities Board:


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